

1 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**

2
3 Plaintiff filed his application for SSI on March 24, 2006, alleging
4 an inability to work since February 17, 2006, due to paranoid
5 schizophrenia. (Administrative Record ("A.R.") 79-81, 91.) He has past
6 relevant work experience as a framer for a lumber company. (A.R. 92,
7 99-100.)

8
9 The Commissioner denied plaintiff's claim for benefits initially
10 and upon reconsideration. (A.R. 50-54, 58-62.) On February 26, 2008,
11 plaintiff, who was represented by counsel, appeared and testified at a
12 hearing before Administrative Law Judge Mason D. Harrell Jr. ("ALJ").
13 (A.R. 22-47.) On May 19, 2008, the ALJ denied plaintiff's claim (A.R.
14 8-15), and the Appeals Council subsequently denied plaintiff's request
15 for review of the ALJ's decision (A.R. 1-3).

16
17 **SUMMARY OF ADMINISTRATIVE DECISION**

18
19 The ALJ found that plaintiff has not engaged in substantial gainful
20 activity since March 24, 2006, the application date. (A.R. 10.) The
21 ALJ further found that plaintiff "is considered to have a 'drug and
22 alcohol condition' and may be eligible for benefits." (*Id.*)

23
24 The ALJ determined that plaintiff has the following "severe"
25 impairments: organic mental disorder with history of psychotic symptoms
26 secondary to drug abuse; personality disorder NOS with antisocial
27 features; and a history of drug abuse. (A.R. 10.) However, plaintiff
28 did not have an impairment or combination of impairments that meets or

1 medically equals one of the listed impairments in 20 C.F.R. Part 404,
2 Subpart P, Appendix 1. (A.R. 11.)

3
4 The ALJ found that plaintiff has the residual functional capacity
5 to perform the strength demands of work at all exertional levels. (A.R.
6 12.) The ALJ further found that:

7
8 [F]rom a non-exertional standpoint, [plaintiff] can perform
9 only moderately complex tasks involving up to four to five-
10 step instructions; he can perform no safety operations; he
11 must wear eyeglasses; people have to talk to him more loudly
12 than normal; he must perform object-oriented work; and he can
13 make no more than occasional contact with others.

14
15 (*Id.*)

16
17 Based upon the ALJ's residual functional capacity assessment and
18 the testimony of a vocational expert, the ALJ determined that
19 plaintiff's functional limitations did not preclude him from performing
20 his past relevant work as a framer for a lumber company. (A.R. 14.)

21
22 Accordingly, the ALJ concluded that plaintiff has not been under a
23 disability, within the meaning of the Social Security Act, since March
24 24, 2006, the date the application was filed. (A.R. 14.)

25
26 **STANDARD OF REVIEW**

27
28 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's

1 decision to determine whether it is free from legal error and supported
2 by substantial evidence in the record as a whole. Orn v. Astrue, 495
3 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant
4 evidence as a reasonable mind might accept as adequate to support a
5 conclusion.'" *Id.* (citation omitted). The "evidence must be more than
6 a mere scintilla but not necessarily a preponderance." Connett v.
7 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). While inferences from the
8 record can constitute substantial evidence, only those "'reasonably
9 drawn from the record'" will suffice. Widmark v. Barnhart, 454 F.3d
10 1063, 1066 (9th Cir. 2006)(citation omitted).

11
12 Although this Court cannot substitute its discretion for that of
13 the Commissioner, the Court nonetheless must review the record as a
14 whole, "weighing both the evidence that supports and the evidence that
15 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of
16 Health and Human Servs., 846 F.2d 573, 576 (9th Cir. 1988); see also
17 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is
18 responsible for determining credibility, resolving conflicts in medical
19 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d
20 1035, 1039-40 (9th Cir. 1995).

21
22 The Court will uphold the Commissioner's decision when the evidence
23 is susceptible to more than one rational interpretation. Burch v.
24 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may
25 review only the reasons stated by the ALJ in his decision "and may not
26 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d
27 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse
28 the Commissioner's decision if it is based on harmless error, which

exists only when it is "clear from the record that an ALJ's error was 'inconsequential to the ultimate nondisability determination.'" Robbins v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v. Comm'r, 454 F.3d 1050, 1055-56 (9th Cir. 2006)); see also Burch, 400 F.3d at 679.

DISCUSSION

Plaintiff presents five issues for this Court's review: (1) whether the ALJ properly considered the treating physician's opinion regarding plaintiff's schizophrenia and assessed GAF score of **40**; (2) whether the ALJ properly considered the treating physician's opinion regarding plaintiff's schizophrenia and assessed GAF score of **45**; (3) whether the ALJ properly considered the state agency findings regarding plaintiff's schizophrenia and episodes of decompensation; (4) whether the ALJ properly considered the licensed social worker's opinion regarding plaintiff's schizophrenia and major thought disorder; and (5) whether the ALJ posed a complete hypothetical question to the vocational expert. (Joint Stipulation ("Joint Stip." at 3.) The first two issues are addressed together below.

I. The ALJ Failed To Set Forth Any Specific And Legitimate Reasons For Rejecting The Opinion Of Plaintiff's Treating Psychiatrist, And The ALJ Improperly Relied On The Opinion Of The Consultative Examiner.

In assessing a claimant's residual functional capacity, the Social Security Administration's regulations favor "the opinion of a treating physician over non-treating physicians." Orn, 495 F.3d at 631; see also

1 Reddick v. Chater, 157 F.3d 715, 725 (9th Cir. 1998); 20 C.F.R. §
2 416.927(d)(1)-(2). Generally, a treating physician's opinion is given
3 greater weight, because "he is employed to cure and has a greater
4 opportunity to know and observe the patient as an individual."
5 Magallanes v. Brown, 881 F.2d 747, 751 (9th Cir. 1989)(citation
6 omitted). If a treating physician's opinion is "well-supported by
7 medically-acceptable clinical and laboratory diagnostic techniques and
8 is not inconsistent with the other substantial evidence in [the] case
9 record, [the Commissioner] will give it controlling weight." 20 C.F.R.
10 § 416.927(d)(2).

11
12 If there is "substantial evidence" in the record that contradicts
13 the opinion of a treating physician, such as an examining physician's
14 opinion supported by independent clinical findings, the opinion of the
15 treating physician is no longer entitled to controlling weight. Orn,
16 495 F.3d at 632. However, a finding that the treating physician's
17 opinion "is not entitled to controlling weight does not mean that the
18 opinion is rejected." Social Security Ruling 96-29 at 1 ("In many
19 cases, a treating source's medical opinion will be entitled to the
20 greatest weight and should be adopted, even if it does not meet the test
21 for controlling weight."). In this instance, the Social Security
22 regulations still require deference to the treating physician's opinion,
23 but the weight accorded it is governed by the factors listed in the
24 regulations, such as length, nature, and extent of the treatment
25 relationship, frequency of examination, and supportability. 20 C.F.R.
26 § 416.927(d)(2); Orn, 495 F.3d at 632-33. When the opinion of a
27 treating physician is contradicted, it may be rejected by the ALJ only
28 for "specific and legitimate" reasons based on substantial evidence in

1 the record. Reddick, 157 F.3d at 725; Lester v. Chater, 81 F.3d 821,
2 830 (9th Cir. 1995).

3
4 In an October 2005 Discharge Summary Report, Dan Zimbroff, M.D., of
5 the Riverside Center for Behavioral Medicine, with whom plaintiff
6 initially treated from October 5, 2005 (admission date), through October
7 21, 2005 (discharge date), diagnosed plaintiff with schizophrenia,
8 paranoid type, and assessed plaintiff with a Global Assessment of
9 Functioning ("GAF") of 40.¹ In an October 5, 2005 Initial Psychiatric
10 Evaluation Form, it was noted that plaintiff "has used cocaine
11 infrequently over the past few months," along with "occasional marijuana
12 use." (A.R. 170.) Dr. Zimbroff reported that plaintiff was "disheveled
13 and thin. Behavior is appropriate culturally, however, fidgety,
14 guarded, and suspicious with sparse speech." (A.R. 168.) Dr. Zimbroff
15 described plaintiff's affect and mood as "hostile, agitated, and guarded
16 [and his] thought content is noted to be positive for delusional
17 thinking and ideas of reference." (*Id.*) Notably, Dr. Zimbroff reported
18 that plaintiff "has auditory hallucinations," and during plaintiff's
19 hospital stay, plaintiff experienced "continued auditory hallucinations
20 and minimizing symptoms, but with prominent paranoia." (*Id.*)

21
22 In an April 2006 Discharge Summary Report, following plaintiff's
23 subsequent hospitalization from March 3, 2006, through April 10, 2006

24
25 ¹ A GAF of 31 to 40 involves "[s]ome impairment in reality testing or
26 communication (e.g., speech is at times illogical, obscure, or
27 irrelevant) or major impairment in several areas, such as work or
28 school, family relations, judgment, thinking, or mood (e.g., depressed
man avoids friends, neglects family, and is unable to work; child
frequently beats up younger children, is defiant at home, and is failing
at school)." Diagnostic and Statistical Manual of Mental Disorders Text
Revision, 34 (4th ed. 2000) ("DSM-IV-TR").

(A.R. 160), Dr. Zimbroff again diagnosed plaintiff with schizophrenia, paranoid type, and this time assessed plaintiff with a GAF of 45.² In a March 9, 2006 Initial Psychiatric Evaluation form, it was noted that plaintiff's "past use" of "cocaine/stimulants" was "4 months ago," and plaintiff's "last use [of] marijuana/hallucinogens" was "1 week ago." (A.R. 164.) Dr. Zimbroff noted that plaintiff's "[a]ffect and mood were blunted and anxious with periods of agitation." (A.R. 160.) Dr. Zimbroff reported that plaintiff's "[t]hought processes were vague and confused. Thought perception was noted for auditory hallucinations. Insight and judgment was fair-to-limited." (*Id.*) Dr. Zimbroff reported that with medication, plaintiff noted "some slight improvement initially in [his] level of auditory hallucinations and paranoid thoughts." (*Id.*)

In the instant case, the ALJ implicitly rejected Dr. Zimbroff's diagnosis of schizophrenia, paranoid type, and his GAF assessments of 40 and 45, and instead relied on the opinions of Clifford Taylor, Ph.D, a consultative psychologist, and Joseph Malancharuvil, Ph.D, a psychologist and non-examining medical expert, in assessing plaintiff's residual functional capacity.³ (A.R. 11.) However, the ALJ's failure

² A GAF of 41-50 involves "[s]erious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) or any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job)." DSM-IV-TR at 34.

³ Dr. Taylor, on whose opinion both Dr. Malancharuvil and the ALJ relied, opined that plaintiff

does not present with schizophrenia, . . . [but] his presentation was more consistent with a long-term cocaine and alcohol abuse problem that can cause psychotic reactions. . . . As a result there is no credible evidence of impairment in his ability to understand, remember, and carry out job instructions, maintain attention, concentration, persistence and pace, relate and interact with supervisors, coworkers, and

1 to discuss Dr. Zimbroff's opinions, much less articulate any specific
2 and legitimate reasons for rejecting them, constitutes error. While
3 defendant correctly notes that low GAF scores do not compel a finding of
4 disability, Dr. Zimbroff's GAF assessments of 40 and 45 are consistent
5 with his opinions of plaintiff's condition. Those opinions discuss
6 plaintiff's serious symptoms, which the ALJ failed to address in his
7 decision, much less properly reject in accordance with the governing
8 legal standard. (Joint Stip. at 6, 9.)

9
10 Moreover, the opinion of Dr. Taylor, on which both Dr.
11 Malancharuvil and the ALJ relied, may not be based on substantial
12 evidence. In his January 9, 2007 consultative psychological evaluation
13 report, Dr. Taylor stated that he only reviewed the following medical
14 records: (1) an October 2005 discharge note; (2) a March 2006 note; and
15 (3) associated hand-written notes from the Department of Corrections.
16 (A.R. 252.) Critically, Dr. Taylor stated that, "[t]here were no other
17 medical records available for review prior to the preparation of [his]
18 report." (*Id.*) The record contains much more medical evidence than
19 that provided to Dr. Taylor. (See, e.g., A.R. 174-77 - Mental RFC
20 Assessment dated 5/16/06; A.R. 178-91 - Psychiatric Review Technique
21 dated 5/16/06; A.R. 192-250 - medical records, treatment notes, and
22 progress reports dated 9/29/03, through 12/15/06, from the State of
23 California, Department of Corrections.) In view of this, it is unclear

24
25 the public, or adapt to day-to-day work activities outside of
26 his drug abuse.

27 (A.R. 13, 256.) In reliance on Dr. Taylor's opinion, Dr. Malancharuvil
28 opined that "when [plaintiff] was using drugs, he most likely had drug-
induced psychotic symptoms, but had none when he was not using drugs."
(A.R. 11.)

1 whether Dr. Taylor based his assessment on a sufficiently complete
2 picture of plaintiff's condition. See 20 C.F.R. § 416.917 ("If we
3 arrange for [a consultative] examination or test, . . . [w]e will also
4 give the examiner any necessary background information about your
5 condition."). In Ladue v. Chater, 1996 WL 83880, *5 (N.D. Cal. 1996),
6 the court concluded that a case must be remanded when "[t]he ALJ failed
7 to conform to 20 C.F.R. § 404.1517 requiring that the consultative
8 examiner be provided with necessary background information regarding the
9 claimant's condition," because the consultative examiner "was provided
10 with only one progress note from Kaiser" and the court found that "it
11 appears from the record that the ALJ gave [the] consultative report
12 considerable weight, even though [the consultative examiner] was lacking
13 important background information regarding plaintiff." See also Nalley
14 v. Apfel, 100 F. Supp. 2d 947, 953 (S.D. Iowa 2000) ("when a claimant is
15 sent to a doctor for a consultative examination, all the available
16 medical records should be reviewed by the examiner"); Hurstrom v.
17 Barnhart, 233 F. Supp. 2d 1159, 1166 (S.D. Iowa 2002) ("There is no
18 indication that either [consultative physician] had access to any of the
19 medical records which were available at the time of their examinations.
20 . . . Even if Plaintiff told the consulting doctors that he had no
21 limitations, these statements are not credible in light of the numerous
22 laboratory reports showing that his blood sugar is out of control.").

23
24 Consequently, because Dr. Taylor assessed plaintiff's residual
25 functional capacity without a complete review of plaintiff's medical
26 records, the Court cannot conclude that Dr. Taylor's opinion constitutes
27 substantial evidence. See 20 C.F.R. § 416.945(a) (a claimant's residual
28 functional capacity is an assessment based upon all of the relevant

evidence); Morgan v. Comm'r of Soc. Sec. Admin., 169 F.3d 595, 600 (9th Cir. 1999)(medical expert opinions constitute substantial evidence only when they are supported by the record and consistent with it).

Although not raised as an issue by the parties, it is unclear to the Court whether the payment of benefits to plaintiff is prohibited by plaintiff's substance abuse. On the one hand, the ALJ downplayed the significance of plaintiff's substance abuse on his mental impairment(s), concluding that "[t]here is no evidence to contradict [plaintiff's] allegation that he has not used drugs for two years." (A.R. 11.) On the other hand, the ALJ concluded that plaintiff's mental limitations are the result of "drug-induced psychotic symptoms," and when plaintiff "abstains from substance abuse, his psychotic symptoms are well-controlled." (A.R. 11, 14.) Given plaintiff's documented drug use prior to and during the period in question, it is unclear whether or not plaintiff's substance abuse is a "contributing factor material to" his mental limitations, and the ALJ should have engaged in the requisite two-step substance abuse analysis.⁴ (See, e.g., A.R. 164 - treatment note dated March 9, 2006, documenting that plaintiff last used marijuana/hallucinogens "1 week ago"); Bustamante, 262 F.3d at 954; see also Souza v. Callahan, 143 F.3d 1240, 1245 (9th Cir. 1998)(ALJ erred by

⁴ First, the ALJ must evaluate which of the claimant's physical and mental limitations would remain if the claimant refrained from drug and alcohol use. Second, the ALJ must determine whether the claimant's remaining limitations would be disabling. 20 C.F.R. § 416.935(b). However, it is not proper simply to conclude that substance abuse is a contributing factor to the mental impairment without distinguishing between the substance abuse contributing to the disability and the disability remaining if the Plaintiff stopped using drugs or alcohol. Bustamante v. Massanari, 262 F.3d 949, 955 (9th Cir. 2001)(ALJ improperly concluded that claimant's mental problems were the consequence of his alcohol abuse without attempting to determine the impact of his alcoholism on his other mental impairments).

1 failing to distinguish between substance abuse "contributing to the
2 disability and the disability remaining after the claimant stopped using
3 drugs or alcohol").

4
5 On remand, if, after properly addressing the medical opinion
6 evidence regarding plaintiff's mental impairment(s), the ALJ concludes
7 that plaintiff is disabled and there is evidence of his continuing drug
8 and/or alcohol abuse, then the ALJ must undertake the requisite two-step
9 analysis to determine whether plaintiff would still be found disabled if
10 he stopped using drugs and/or alcohol.

11
12 **II. The ALJ Failed To Provide Legally Sufficient Reasons For**
13 **Disregarding The Findings Of The State Agency Physician.**

14
15 Pursuant to the Commissioner's regulations:

16
17 Administrative law judges are not bound by any findings made
18 by State agency medical or psychological consultants, or other
19 program physicians or psychologists. However, State agency
20 medical and psychological consultants and other program
21 physicians and psychologists are highly qualified physicians
22 and psychologists who are also experts in Social Security
23 disability evaluation. Therefore, administrative law judges
24 must consider findings of State agency medical and
25 psychological consultants or other program physicians or
26 psychologists as opinion evidence

27
28 20 C.F.R. § 416.927(f)(2)(i). Moreover, Social Security Regulation 96-

1 6p makes plain that, although administrative law judges and the Appeals
2 Council are not bound by findings made by State agency or other program
3 physicians and psychologists, administrative law judges and the Appeals
4 Council "*may not ignore these opinions and must explain the weight given*
5 *to the opinions in their decisions.*" *Id.* (emphasis added).
6

7 Plaintiff contends that the ALJ failed to address, and ultimately
8 rejected without providing legally sufficient reasons for doing so,
9 certain findings of the State agency physician contained in a May 15,
10 2006 Psychiatric Review Technique form. (Joint Stip. at 10; A.R. 178-
11 91.) Specifically, plaintiff contends that the ALJ failed to address
12 the State agency physician's opinion that plaintiff had: (1) diagnoses
13 of "schizophrenia, paranoid, and other psychotic disorders" and
14 "delusions and hallucinations"; (2) *moderate* limitations in maintaining
15 social functioning; and (3) experienced *one to two* episodes of
16 decompensation, each of extended duration. (A.R. 178, 188.)
17

18 In his decision, the ALJ stated that he "considered the medical
19 source opinions made by non-examining State Agency consultants" and "the
20 opinion is given significant weight." (A.R. 14.) However, despite the
21 "significant weight" purportedly given to the State agency physician's
22 opinion, the ALJ concluded that plaintiff's mental impairments resulted
23 in only *mild* difficulties in maintaining social functioning and *no*
24 episodes of decompensation. (A.R. 12, 14.) Given this inconsistency,
25 it is unclear whether the ALJ properly considered the opinion of the
26 State agency physician in accordance with the appropriate legal
27 standards.
28

1 Accordingly, remand is appropriate to allow the ALJ the opportunity
2 to clarify the weight given to the State agency physician's opinion,
3 and/or to set forth legally sufficient reasons, if any, for rejecting
4 the opinion.

5
6 **III. The ALJ Was Not Required To Discuss The Statements Of The Licensed**
7 **Social Worker.**

8
9 A social worker's opinion is an "acceptable source" of medical
10 evidence only if the social worker acts as an agent of a licensed
11 physician or psychologist. See Gomez v. Chater, 74 F.3d 967, 970-71
12 (9th Cir. 1996)(non-medical source must work in conjunction with
13 acceptable medical source); see also 20 C.F.R. § 416.913(a), (d)(3),
14 (e)(1). The social worker must act so "closely under the supervision"
15 of the treating physician that the social worker's opinion should be
16 "properly considered as part of the opinion" of the physician. Gomez,
17 74 F.3d at 971.

18
19 Moreover, Social Security Regulation ("SSR") 06-3p states, in
20 relevant part, that:

21
22 For opinions from sources such as teachers, counselors, and
23 social workers who are not medical sources, and other
24 non-medical professionals, it would be appropriate to consider
25 such factors as the nature and extent of the relationship
26 between the source and the individual, the source's
27 qualifications, the source's area of specialty or expertise,
28 the degree to which the source presents relevant evidence to

1 support his or her opinion, whether the opinion is consistent
2 with other evidence, and any other factors that tend to
3 support or refute the opinion.
4

5 Plaintiff contends that the ALJ committed reversible error by
6 failing to address a one-page "Medical Report" form, dated June 25,
7 2007, completed by T. Mrozek, a licensed social worker. (A.R. 13.) On
8 this form, Mr. Mrozek noted that plaintiff's diagnosis was
9 "schizophrenia, paranoid, chronic," and his prognosis was "guarded."
10 (A.R. 273.) Mr. Mrozek further noted that plaintiff has experienced
11 "severe and persistent symptoms of a major thought disorder, onset 1992,
12 to current." (*Id.*) Finally, Mr. Mrozek noted that plaintiff's probable
13 duration of incapacity was from June 2007, through December 2007. (*Id.*)
14

15 There is no evidence that Mr. Mrozek acted as an agent of any
16 licensed physician or psychologist, or that he acted so "closely under
17 the supervision" of the treating physician that his "opinion" should be
18 "properly considered as part of the opinion" of the physician. Gomez,
19 74 F.3d at 971. Moreover, as defendant correctly notes, there is no
20 evidence that Mr. Mrozek had any relationship whatsoever with plaintiff,
21 and Mr. Mrozek provided no "evidence to support his . . . opinion."
22 (Joint Stip. at 14-15.) See SSR 06-3p. Further, the instructions on
23 this one-page form state that it must be completed by "a physician,
24 psychiatrist, psychologist, or authorized public health dept. medical
25 professional." (A.R. 273.) There is no evidence to suggest that Mr.
26 Mrozek is properly qualified to execute this form. Finally, with
27 respect to Mr. Mrozek's conclusory statement that plaintiff was
28 "permanent[ly]" disabled and unable to work from June 2007, through

1 December 2007, the issue of whether a claimant is or is not disabled is
2 reserved to the Commissioner. See 20 C.F.R. § 416.927(e) (listing
3 issues reserved to the Commissioner, such as determination of
4 disability); see also Nyman v. Heckler, 779 F.2d 528, 531 (9th Cir.
5 1986)(conclusory opinions regarding ultimate issue of disability are not
6 binding). Thus, the ALJ was not required to discuss Mr. Mrozek's
7 statements on the one-page form.

8
9 **IV. Until The ALJ Has Properly Considered The Medical Opinion Evidence,**
10 **The Court Cannot Assess The Adequacy Of The Hypothetical Posed To**
11 **The Vocational Expert.**

12
13 In posing a hypothetical to a vocational expert, the ALJ must
14 accurately reflect all of the claimant's limitations. Embrey v. Bowen,
15 849 F.2d 418, 422-24 (9th Cir. 1988). For the vocational expert's
16 testimony to constitute substantial evidence, the hypothetical question
17 posed must "consider all of the claimant's limitations." Andrews, 53
18 F.3d at 1044 (holding that hypothetical questions that do not include
19 all of the plaintiff's limitations are insufficient and warrant remand).

20
21 Here, the hypothetical may be incomplete to the extent that it does
22 not reflect appropriately, in whole or in part, the medical opinion
23 evidence of record. On remand, the ALJ should either properly reject
24 the opinions of plaintiff's treating psychiatrist and the State agency
25 physician in accordance with the appropriate legal standards, or the ALJ
26 must incorporate all of plaintiff's limitations that are not properly
27 rejected into the hypothetical posed to the vocational expert.

1 **V. Remand Is Required.**

2
3 The decision whether to remand for further proceedings or order an
4 immediate award of benefits is within the district court's discretion.
5 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
6 useful purpose would be served by further administrative proceedings, or
7 where the record has been fully developed, it is appropriate to exercise
8 this discretion to direct an immediate award of benefits. *Id.* at 1179
9 ("the decision of whether to remand for further proceedings turns upon
10 the likely utility of such proceedings"). However, where there are
11 outstanding issues that must be resolved before a determination of
12 disability can be made, and it is not clear from the record that the ALJ
13 would be required to find the claimant disabled if all the evidence were
14 properly evaluated, remand is appropriate. *Id.*

15
16 Here, remand is the appropriate remedy to allow the ALJ the
17 opportunity to remedy the above-mentioned deficiencies and errors. See,
18 e.g., Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004)(remand for
19 further proceedings is appropriate if enhancement of the record would be
20 useful); McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir.
21 1989)(remand appropriate to remedy defects in the record).

22
23 **CONCLUSION**

24
25 Accordingly, for the reasons stated above, IT IS ORDERED that the
26 decision of the Commissioner is REVERSED, and this case is REMANDED for
27 further proceedings consistent with this Memorandum Opinion and Order.
28

1 IT IS FURTHER ORDERED that the Clerk of the Court shall serve
2 copies of this Memorandum Opinion and Order and the Judgment on counsel
3 for plaintiff and for defendant.

4
5 LET JUDGMENT BE ENTERED ACCORDINGLY.

6
7 DATED: March 31, 2010

8 
9 MARGARET A. NAGLE
UNITED STATES MAGISTRATE JUDGE